UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD TWENTY-SEVENTH REGION

SUPERSHUTTLE INTERNATIONAL DENVER, INC.

Employer,

and Case 27-RC-8582

COMMUNICATIONS WORKERS OF AMERICA

Petitioner,

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. On August 29, 2011, I issued an Order to Show Cause requesting that the parties show cause why I should or should not direct an election in the petitioned-for unit. In their responses to the Order, the Communications Workers of America (Petitioner) and SuperShuttle International Denver, Inc., (SuperShuttle or Employer), presented no factual statements or documents to establish that it was necessary to take further evidence and no party requested that the record be reopened. Accordingly, I find, as discussed more fully below, that it is appropriate to direct an election in the petitioned-for bargaining unit at a date, time and place to be determined.

STATEMENT OF THE CASE

1. Procedural History:

On December 11, 2009, the Petitioner, filed a petition seeking to represent the shuttle van drivers employed by SuperShuttle in its Denver, Colorado metropolitan area

operations.¹ A hearing was held on December 28, 2009, and January 7, 8, and 12, 2010 in Denver, Colorado. On February 26, 2010, then Regional Director Michael W. Josserand issued a Decision and Order finding the petitioned-for shuttle van drivers to be statutory employees, not independent contractors, as asserted by the Employer. Additionally, the Regional Director found that the Employer failed to meet its burden of establishing that the unit franchisee shuttle drivers are statutory supervisors. The Regional Director found, however, that the Petitioner was disqualified from representing this bargaining unit because of a disabling conflict of interest, and dismissed the petition on that basis.

Both parties timely filed requests for review with the National Labor Relations Board (Board). On March 11, 2010, the Employer petitioned for review of the Regional Director's finding that the petitioned-for shuttle van drivers were statutory employees, rather than independent contractors or statutory supervisors. On March 12, 2010, the Petitioner petitioned for review of the Regional Director's finding that there was a disabling conflict of interest, which precluded it from representing the petitioned-for unit of employees.

On May 5, 2010, the Board issued an Order granting the Petitioner's request for review, but denying the Employer's request for review.

On July 18, 2011, the Board issued a Decision on Review and Order, reversing the Regional Director's finding that there was a disabling conflict of interest that

INCLUDED: All full-time and part-time shuttle van drivers employed by the Employer in its Denver, Colorado operations.

EXCLUDED: All other employees, confidential employees, professional employees, managers, guards, and supervisors as defined by the Act.

¹ The petitioned-for bargaining unit is as follows:

prevented the Petitioner from representing the petitioned-for unit, reinstated the petition, and remanded it to me for further appropriate action.²

On August 29, 2011, I issued an Order to Show Cause, affording the parties an opportunity to show cause why, based upon the record in this matter, I should or should not direct an election in the petitioned-for unit. The Order to Show Cause specifically required that any party responding to the Order: "shall file a written statement with the Regional Director, including supported factual statements and documents and detailed argument in support of their positions. The parties shall address the appropriateness of the petitioned-for unit." The Petitioner and Employer filed timely responses to the Order to Show Cause.

2. Positions of the Parties In Response To the Order To Show Cause:

The Petitioner asserted that there were no changed circumstances necessitating reopening the record, and that an election should be scheduled as soon as possible.

The Employer asserted that an election should not be directed, citing six specific bases for dismissing the underlying petition. Notably, the Employer did not explicitly assert that the underlying record must be reopened to obtain evidence relating to any changed circumstances since the original Decision and Order issued on February 26, 2010. Rather, the Employer stated that there were "critical impediments to an election." The Employer did not provide any new evidence relating to changed circumstances, but instead, based its arguments primarily on its pleadings filed in the underlying proceedings. The Employer appended the following pleadings to its response: Employer's Post-Hearing Brief; Request for Review; Statement in Opposition to the Union's Request for Review; and Brief on Review to Sustain Disqualification of Petitioner.

_

² SuperShuttle International Denver, Inc., 357 NLRB No. 19 (July 18, 2011).

The Employer made the following six assertions in response to the Order to Show Cause:

- A. Changed circumstances make an election of the petitioned-for unit inappropriate.
- B. The Regional Director's Decision improperly failed to consider the ample and undisputed record of independent contractor status and entrepreneurial freedom.
- C. The Regional Director's Decision failed to decide the supervisory issue.
- D. The NLRB has no authority to invalidate business entities or void valid franchise agreements.
- E. The NLRB's Decision overturning the disqualification of the Union misstates the record and abandons Board precedent.
- F. The Regional Director's Decision in Case 27-RC-8582, in light of the Board's refusal to grant review on the independent contractor issue, lacks authority under *New Process steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010).

Based on the fact that neither the Petitioner nor the Employer has asserted that it would be inappropriate to direct an election without first reopening the underlying record, and no evidence was presented to warrant such action, I find that it is appropriate to direct an election herein. In this regard, while the Employer has asserted various reasons why it contends it is inappropriate to hold an election at all, and that the petition should be dismissed, the Employer has not urged that the underlying record be reopened. Accordingly, I shall direct that an election be held in the petitioned-for bargaining unit, at a date, time and place (or dates, times, and places), to be determined.

3. Analysis of the Employer's assertions:

A. <u>Changed circumstances make an election of the petitioned-for unit inappropriate.</u>

The Employer asserts that there are changed circumstances because of employee turnover, and because the current drivers are operating under a new annual Unit Franchise Agreement (UFA). With regard to employee turnover the Employer did not provide any direct evidence. Rather, the Employer asserted that: "there has been

not insignificant turnover in franchisees; there are several new franchisees, and an even larger number of franchisees at the time of the Hearing have ceased their business relationship with SuperShuttle Denver."

With regard to the new UFA, the Employer did not provide a copy with its response, and also did not provide a detailed description or analysis of any language changes between the UFA in effect at the time of the hearing and the most recent iteration of the UFA as explicitly required by the Order to Show Cause. Moreover, the Employer did not assert that the purported changed circumstances warranted reopening the underlying record, but merely stated: "Because the record on which the Decision was based is stale, the Regional Director should not direct an election in this case."

I find that the Employer's response to the Order to Show Cause did not provide sufficient factual support or legal arguments to establish a basis that would require reopening of the underlying record to elicit evidence of changed circumstances, and, accordingly, I am declining to do so.

B. The Regional Director's Decision improperly failed to consider the ample and undisputed record of independent contractor status and entrepreneurial freedom.

In support of this assertion, the Employer argues that the underlying finding that drivers are statutory employees and not independent contractors is clearly erroneous. Accordingly, the Employer states that I "should not direct an election, but rather reconsider this matter based on the current facts." As noted, however, the Employer did not provide sufficient evidence to establish that there are any changed circumstances warranting reopening the record. Since the Board expressly denied the Employer's Request for Review of the underlying independent contractor findings, I find that it is inappropriate for me to reopen the record or dismiss the petition in these circumstances.

C. The Regional Director's Decision failed to decide the supervisory issue.

In its response to the Order to Show Cause, the Employer stated: "The Decision in Case 27-RC-8582 also is clearly erroneous because it failed to decide [the] supervisory issue, which SuperShuttle Denver briefed and explicitly raised on the record." The Employer further asserted, apparently based on the underlying record evidence, that all of the shuttle van drivers are statutory supervisors because they may elect to use relief drivers to operate their vans.

The Employer appears to rely on preliminary comments in the February 26, 2010, Decision and Order (page 2) wherein the Regional Director concluded that the record was insufficient to make a determination regarding the supervisory status of the unit franchisees. However, in the "Legal Analysis and Conclusions" section of the Decision (page 28), then Regional Director Josserand also found that: "the Employer has failed to meet its burden of establishing that the unit franchisee shuttle van drivers are statutory supervisors. See e.g., *NLRB v. Kentucky River Community Care*, 532 U. S. 706 (2001)."

The Employer acknowledged in its response to the Order to Show Cause that it raised this supervisory issue in its Request for Review, which was denied by the Board in the May 5, 2011 Order. Since the Employer raised this issue in its Request for Review, it would be inappropriate for me to reconsider the supervisory issue in the absence of clear evidence of changed circumstances relating to the purported supervisory status of any specific shuttle van driver.

My Order to Show Cause requested that the parties provide factual statements and documents relating to its arguments, which the Employer did not provide in support of this contention. Rather, the Employer proffered the same arguments already rejected

by the Board. Accordingly, it would be inappropriate for me to reconsider the record or dismiss the petition on this basis.

D. <u>The NLRB has no authority to invalidate business entities or void valid franchise agreements.</u>

The Employer argues that: "the Regional Director is without authority (1) to direct an election of franchisees who do business as businesses, which would have the effect of invalidating entities lawfully formed under state law, or (2) to void franchise agreements lawfully formed under state and federal law." In support of its arguments, the Employer cites two Supreme Court cases involving complicated preemption issues: San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), and Lodge 76, International Association n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission, 427 U.S. 132, 140 (1976).

The Employer's argument appears to be a challenge to the original finding by the Regional Director, as affirmed by the Board,³ that the van drivers are statutory employees. I find the cases cited by the Employer inapposite to the issues decided by the Board regarding the independent contractor status of the shuttle van drivers. The Board in *Roadway Package System, Inc.*, 326 NLRB 842 (1998) and *Dial-A-Mattress Operating Corporation*, 326 NLRB 884 (1998), decided the same day, affirmed that the proper analysis to be used in determining whether an individual is an employee or an independent contractor under Section 2(3), is the commonlaw agency test that involves the multifactor analysis set forth in Restatement (Second) of Agency, Section 220(2).⁴ The Regional Director specifically found that

-

³ See the Board's Decision on Review and Order, *Id.*, fn. 1, in which the Board stated that in its May 5, 2010 Order granting the Petitioner's request for review, it also "denied the Employer's request for review of the Regional Director's finding that the petitioned-for SuperShuttle van drivers were statutory employees rather than independent contractors."

⁴ The common law factors include, *inter alia*, "the extent of control which, by the agreement, the master may exercise over the details of the work"; "the kind of occupation"; whether the worker "supplies the instrumentalities, tools, and the place of work"; "the method of payment, whether by

while some of the shuttle van drivers had formed their own legal business entities, the Employer put sufficient restrictions on those entities, including the prohibition on franchisees transferring their franchise without obtaining the Employer's approval, to weigh in favor of a finding that the drivers were not independent contractors. Since this matter was fully litigated in the underlying proceeding, it would be inappropriate for me to reopen the record or dismiss the petition based on the Employer's contention that the drivers are independent contractors, which has already been rejected by the Board.

E. <u>The NLRB's Decision overturning the disqualification of the Union misstates the record and abandons Board precedent.</u>

This assertion by the Employer appears to seek my reconsideration of the Board's Decision on Review and Order, which I do not have the authority to do.

F. The Regional Director's Decision in Case 27-RC-8582, in light of the Board's refusal to grant review on the independent contractor issue, lacks authority under *New Process steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010).

The Employer asserts that because the underlying Regional Director's Decision and Order was issued at a time when the National Labor Relations Board lacked a quorum, the Regional Director also lacked authority to issue decisions.

In issuing his Decision and Order, the Regional Director acted pursuant to a 1961 delegation of authority by the Board under Section 3(b) of the Act, granting regional directors authority to decide representation case issues. In its response to the Order to Show Cause, the Employer has not cited any authority establishing that this long-standing authority granted to regional directors to issue decisions was altered by the Supreme Court in its *New Process Steel* decision. I find that subsequent Board cases, in fact, establish the opposite. See e.g., *Brentwood Assisted Living Community*, 355 NLRB No. 149 (August 27, 2010), in which the Board rejected the employer's contention

the time or by the job"; "the length of time for which the person is employed"; whether "the work is a part of the regular business of the employer"; and the intent of the parties. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, fn 1 (D.C. Cir. 2009)

that, pursuant to the Supreme Court's *New Process Steel* decision, the Agency's processing of a representation case while there was a two-member Board was undertaken without a proper quorum. Specifically, the Board held that "[t]he Regional Director properly processed the underlying representation proceeding by virtue of the authority delegated to him under Sec. 3(b) of the Act. See 26 F.R. 3911 (Board's delegation of authority in representation proceedings to regional directors.)"

Moreover, even assuming that the Regional Director lacked authority to issue his Decision and Order while there was a two-member Board, there is no reason to conclude that the result would have been different had the Regional Director elected to abstain from issuing his decision until the Board had a quorum after March 27, 2010. Thus, the timing of the Regional Director's issuance of the Decision and Order was, at worst, harmless error. See, e.g., *Contemporary Cars, Inc.*, 355 NLRB No. 113 (August 23, 2010) (holding that a regional director's conduct of an election and counting of ballots during the period when there was a two-member Board "was, at worst, harmless error that did not affect the validity of ballots"); and *Fred Meyer Stores, Inc.*, 355 NLRB No. 130 (August 26, 2010).

I find the case cited by the Employer, *Rochelle Waste Disposal, LLC*, 355 NLRB No. 100 (2010), inapposite. In *Rochelle Waste Disposal*, the Board stated: "However, the postelection representation issues raised by the Respondent were resolved in a two-member decision and we do not give that decision preclusive effect." Thus, it was an actual two-member Board decision - not a Regional Director's decision - that the Board determined must be revisited by the Board once it had attained a quorum.

Finally, after the Regional Director issued his Decision and Order, the Employer and the Petitioner each filed a request for review with the Board. The Board issued a decision on those requests for review on May 5, 2010, after it had a guorum.

Specifically, on May 5, 2010, Board Members Schaumber, Becker, and Pearce participated in the determination to deny the Employer's request for review and grant the Petitioner's request for review. Thus, it is clear that the Employer obtained review of the Regional Director's Decision and Order from a three-member panel of the Board. Accordingly, the Employer has not been prejudiced by the mere fact that when the Regional Director issued his Decision and Order on February 26, 2010, there were only two Board members.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find that the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and part-time⁵ shuttle van drivers employed by the Employer in its Denver, Colorado operations.

EXCLUDED: All other employees, confidential employees, professional employees, managers, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by:

Communications Workers of America

The election will be held at a date, time and a place (or dates, times and places) to be determined by the Regional Director. The date, time and place of the election will

or are casual employees, the relief drivers may vote subject to challenge.

⁵ The underlying record establishes that some shuttle van drivers have occasionally utilized relief drivers. The Employer concedes in its response to the Order to Show Cause that relief drivers "are subsumed within the petitioned-for unit." Because it cannot be determined at this time whether the relief drivers have worked sufficient hours to constitute regular part-time employees

be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the *full* name and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 600 17th Street, 7th Floor, North Tower, Denver, Colorado, on or before <u>September 27, 2011</u>. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, <u>www.nlrb.gov</u>, 6 by mail, or by facsimile transmission at (303-844-6249). The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Since the list will be made

⁶ To file the eligibility list electronically, go to <u>www.nlrb.gov</u> and select the **E-GOV** tab. Then click on the **E-FILING** link on the menu, and follow the detailed instructions.

available to all parties to the election, please furnish a total of two (2) copies of the list, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

Pursuant to the Board's Rules and Regulations, Sections 102.111–102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on October 4, 2011, at 5 p.m. Eastern Time, unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for

review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁷

A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-GOV tab, click on E-Filing, and follow the detailed directions. The responsibility for the receipt of the request for review rests exclusively with the sender.

⁷ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED at Denver, Colorado, this 20th day of September 2011.

Wanda Pate Jones, Regional Director National Labor Relations Board, Region 27

Dominion Towers 600 17th Street, Suite 700, North Tower Denver, Colorado 80202-5433